

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34737

YELLOWSTONE VALLEY RAILROAD, INC.
-LEASE AND OPERATION EXEMPTION-
BNSF RAILWAY COMPANY

214500

PETITION FOR STAY

ENTERED
Office of Proceedings

AUG 08 2005

Part of
Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

August 8, 2005

Attorney for John D. Fitzgerald

*/ Expedited handling is requested inasmuch as the exemption is otherwise to become effective August 9, and the exemption/transaction is noticed to become operative August 15, 2005.

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34737

YELLOWSTONE VALLEY RAILROAD, INC.
-LEASE AND OPERATION EXEMPTION-
BNSF RAILWAY COMPANY

PETITION FOR STAY

Preliminary Statement

Protestant, John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), petitions the Surface Transportation Board (Board), that the Board stay the exemption, and/or operation of the Notice of Exemption (Notice), filed August 2, 2005, pursuant to the non-carrier line acquisition class exemption, 49 CFR §1150.31,^{2/} by non-carrier Yellowstone Valley Railroad, Inc. (YVRR), pending disposition of protestant's petition for discovery, and forthcoming petition to revoke the exemption.

YVRR proposes to lease and operate two lines from BNSF Railway Company (BNSF), and to conduct overhead trackage rights over two segments of BNSF trackage, comprising approximately 200.2

^{1/} General Chairman for United Transportation Union on lines of BNSF Railway Company, with offices at 400 East Evergreen Blvd., Vancouver, WA 98660.

^{2/} See: Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985).

miles of line, all in the State of Montana. One line to be lease is between Glendive and Snowden, a distance of apx. 72.6 miles, and the other leased line is between Bainville and Scobey, a distance of apx. 99.4 miles. The two trackage rights segments, claimed to be "incidental" to the transaction, are (1) in the Glendive area for apx. 6 miles, and (2) between Snowden and Bainville, a distance of apx. 22.2 miles. A sketch map of the involved lines in eastern Montana, taken from the Notice, is Appendix 1 hereto.

Petitioner unsuccessfully sought to secure a copy of the lease and trackage rights agreements from YVRR, and on August 5, 2005, filed a petition for discovery with the Board, which is pending.

A stay is necessary in order that UTU/GO-386 may secure discovery materials to supplement this petition for stay, and to file an appropriate petition to revoke, and to prevent irreparable injury pending disposition of the petitions for stay and to revoke the exemption.

The verified statement of John D. Fitzgerald is attached hereto in support of the stay request.

REASONS FOR A STAY

The Board should stay the exemption, or stay the operation of the exemption:

1. STB Jurisdiction. Unless the exemption is stayed, the exemption will become effective August 9, 2005, even though YVRR states it expects the transaction to be consummated on or shortly

after August 15, 2005. (Notice, 4). To be sure, the Board has authority to stay an exemption (or the operation of an exemption) after the exemption becomes effective, but prior to consummation of the transaction. This was settled long ago in Finance Docket No. 32392, Chicago Southshore & South Bend Railroad--Trackage Rights Exemption--Norfolk and Western Railway Company (served Dec. 23, 1993), and numerous subsequent cases. However, a carrier sometimes changes its mind, and will consummate a transaction earlier than its announced intention, to the detriment of adverse parties. See: Finance Docket No. 34255, Portland & Western Railroad, Inc.-Lease and Operation Exemption-The Burlington Northern and Santa Fe Railway Company (BNSF/P&W Letter, filed Dec. 30, 2002).

A stay is necessary to preserve the effective jurisdiction of the Board (sometimes considered for "housekeeping" purposes).

2. Discovery. UTU/GO-386 on August 5, 2005, filed a petition for discovery with the Board, after YVRR declined to permit examination of the underlying lease materials, absent an order from the Board. The YVRR action was inappropriate in light of the tight time frame for securing information necessary for a more complete petition for stay, and subsequent petition to revoke. The Board should expect prompt response from YVRR in situations such as the YVRR proposal.

This is a very extensive line lease/trackage rights transaction, embracing over 200 miles of line, and which connects major channels of commerce. Discovery is a high priority, so that the parties and the Board itself may have all of the necessary facts.

The YVRR action in withholding information furnishes strong support for a stay at this time. The Board should not encourage YVRR's behavior.

3. Strong Case on the Merits. This proceeding has unusual features, which indicates protestant has a strong likelihood of success on the merits, even in the present absence of underlying agreement(s) between BNSF and YVRR.

A. Incidental Trackage Rights. Incidental trackage rights are an operating franchise granted by the seller that occurs at the time of the acquisition or operation of a line. Class Exemption, 1 I.C.C.2d 810 at 816. However, not all trackage rights granted at the time of a line sale are "incidental." For a situation involving BNSF and inappropriate so-called "incidental" trackage rights, see: Finance Docket No. 34304, The Burlington Northern and Santa Fe Railway Company-Trackage Rights Exemption-The Portland & Western Railroad, Inc. (served Feb. 3, 2003); Finance Docket No. 34255, Portland & Western Railroad, Inc.-Lease and Operation Exemption-The Burlington Northern and Santa Fe Railway Company (served Dec. 12, 2002). Here, BNSF's grant of an extensive main line 22.2-mile trackage rights to YVRR for operation between Snowden and Bainville is wholly inappropriate to BNSF's lease of the Bainville-Scobey line. If BNSF wishes to accord YVRR trackage rights over this important BNSF Hi-Line segment, such trackage rights must be subject to 49 U.S.C. 11323(a)(6), and mandatory employee protective conditions. Moreover, as J.D. Fitzgerald points out in his verified statement, the precise limits of the Snowden-Bainville trackage rights are not clear.

Although the 6.0-mile trackage rights near Glendive may appear appropriately "incidental" to the Glendive-Snowden segment, the precise limits of such proposed trackage rights are unclear.

B. Lease of Lines. Protestant is under the impression that the so-called "lease" between BNSF and YVRR may not be a bona fide lease, but may be simply an arrangement whereby BNSF pays YVRR for work presently performed by BNSF employees on the involved lines.

C. Collective Bargaining Agreements. Protestant believes it will prevail in its contention that the lease/trackage rights agreement(s) is motivated by a BNSF desire to change its collective bargaining agreements without resort to the provisions of the Railway Labor Act.

4. Irreparable Injury. A stay is necessary to prevent irreparable injury to BNSF employees. The two line segments to be leased are served by three BNSF locals, as set forth by J.D. Fitzgerald. There are about 1300 cars on the Bainville-Scobey segment, and about 6000 on the Glendive-Snowden segment. The estimated job loss would be 9 employees, with those adversely affected not eligible for compensation under their collective bargaining agreement with UTU even if protestant should prevail on the merits in setting aside the Notice of Exemption. Moreover, there is the effect upon quality of life for those adversely affected, which cannot be compensated by monetary damages.

5. Absence of Public Injury. A stay would not harm the public. Indeed, the public would benefit by a stay. BNSF would continue to provide the local service, and as the only connecting carrier to YVRR, would provide the long-haul transportation to and from destinations. Moreover, YVRR operation of the Glendive-

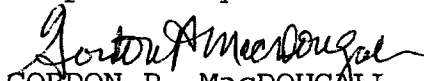
Snowden segment would place YVRR as the operator of the BNSF's main line coal line between the former Northern Pacific and Great Northern lines, and over which considerable empty equipment is utilized for coal shipments.

The public interest supports a stay pending discovery responses, and pending disposition of protestant's forthcoming petition to revoke.

CONCLUSION

The Board should stay the exemption, or the operation of the exemption, pending discovery ruling, and pending disposition of protestant's forthcoming petition to revoke.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

August 8, 2005

Attorney for John D. Fitzgerald

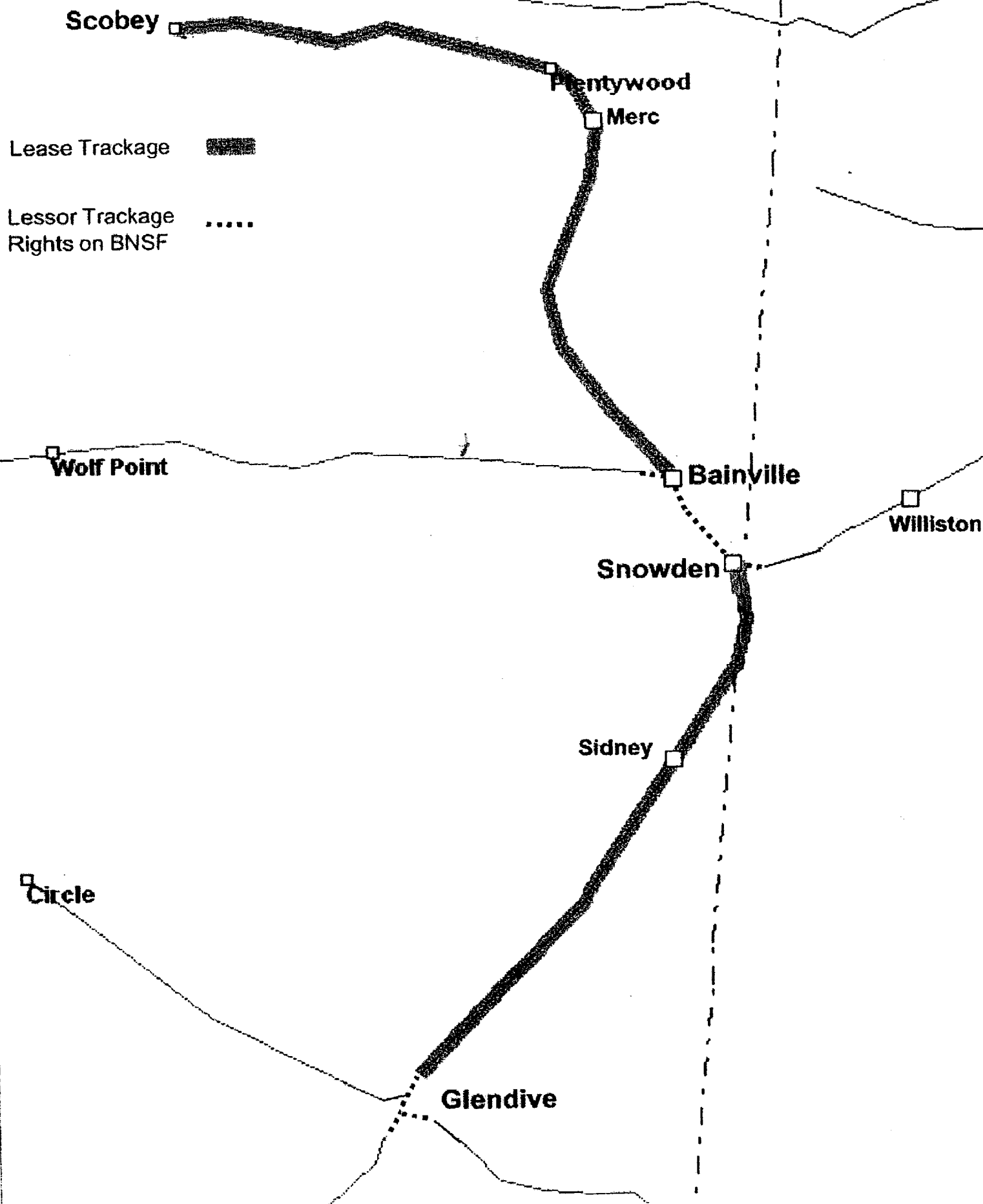
Certificate of Service

I hereby certify I have served a copy of the foregoing upon counsel for YVRR, by personal service, as follows:

KARL MORELL
1455 F St., N.W.-#225
Washington DC 20005

Washington DC


Gordon P. MacDougall



VERIFIED STATEMENT
OF
JOHN D. FITZGERALD

My name is John D. Fitzgerald, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660. I serve as General Chairman for General Committee of Adjustment 386, United Transportation Union (UTU), for lines of BNSF Railway Company (BNSF).

I commenced railroad service in September 1970 on Burlington Northern Railroad Company (BN), predecessor of the present BNSF, and am a Conductor. I became a UTU Local Chairman in 1975, and Assistant General Chairman in 1981. I assumed my present position as General Chairman in August 1993, a full-time elective position, which I hold today.

My railroad experience, and duties with UTU over the years, have made me fully familiar with railroad operations in the Pacific Northwest, and in the State of Montana.

1. I have read the Notice of Exemption (Notice), filed August 2, 2005, by the non-carrier Yellowstone Valley Railroad, Inc. (YVRR), to lease and operate two lines in Montana, and two so-called "incidental" trackage rights over BNSF lines. One leased line is between Glendive and Snowden, a distance of apx. 72.6 miles, and the other leased line is between Bainville and Scobey, a distance of apx. 99.4 miles. The first incidental trackage rights is for apx. 6 miles in the vicinity of Glendive, and the other incidental trackage rights is for apx. 22.2 miles between Snowden and Bainville. The mileage being leased is apx. 171.97 miles, with an additional 28.2 miles of trackage rights, for a

total of 200.2 miles, all in the State of Montana. The YVRR Notice has a sketch map (Exhibit A) indicating the trackage embraced in its proposed lease and trackage rights from BNSF. I have reproduced the YVRR sketch map as my Exhibit 1 hereto.

2. I have been involved in many BNSF line spin-off transactions. The instant lease and trackage rights are far from typical, and is most unusual. This is a large transaction which, if permitted to become effective, would adversely affect many railroad employees, their families, and communities.

I have requested information concerning the terms of the lease and trackage rights arrangements, and have sought discovery on my behalf, from YVRR and the Surface Transportation Board. One part of my concern is the bona fides of the so-called "incidental" trackage rights. For example, Exhibit 1 indicates the trackage rights would embrace several lines at Glendive (in the direction of Forsyth, MT to the west, and Bismarck, ND to the east) beyond the leased trackage between Glendive and Snowden. In addition, Exhibit 1 indicates the trackage rights between Snowden and Bainville would embrace trackage at Snowden (in the direction of Williston, ND to the east), and at Bainville (in the direction of Wolf Point, MT to the west). I do not see any basis for extensive "incidental" trackage rights in the Glendive area, and no basis whatsoever for any "incidental" trackage rights between Bainville and Snowden. YVRR can easily interchange its traffic to and from the Scobey line with BNSF at Bainville.

Further, I question the bona fides of the so-called "lease" of the lines from BNSF. It is my understanding that many such "lease" arrangements are not a lease in the conventional sense,

but are simply "rent free" transactions whereby the short line lessee pays virtually nothing, and it is the class I carrier which makes the payments--in short, it is a contracting-out situation rather than a lease.

3. I have read the Watco Companies Notice of Exemption in F.D. No. 34736 (Watco Notice), to add YVRR to its list of controlled carriers if YVRR becomes a carrier. I find nothing in Watco Notice which would indicate that Watco's operation of the YVRR properties would be advantageous to railroad transportation. The only connecting carrier for YVRR would be BNSF; and it appears that YVRR would necessarily rely upon BNSF, rather than Watco, for car supply and for freight rates.

4. Substitution of YVRR for BNSF would displace BNSF operations and BNSF employees. BNSF operates a local between Glendive and Sidney as may be required; under normal conditions, BNSF operates a local between Sidney and Snowden; BNSF operates a local between Williston-Snowden-Bainville, and the Scobey branch as required. If the transactions is consummated, I estimate the displacement of 9 employees (3 engineers and 6 trainmen). The effect of the exercise of seniority for these 9 persons will result in the loss of employment and/or overtime for a comparable number of employees. In the event the transaction is ultimately set aside, I know of no way those adversely affected in the interim would be entitled to compensation under our collective bargaining agreements. Moreover, the exercise of seniority and adverse effects would affect the quality of life, for which no compensation can adequately remedy.

I have secured traffic information from UTU operating personnel for the lines proposed to be leased. I have also reviewed the recent (June 23, September 9, and October 29, 2004) reports for State of Montana agencies, prepared by R.L. Banks & Associates.

The 44.63-mile segment of the Scobey line west of Plentywood has not been operated since 2002; BNSF in late 2003 announced its intention to abandon this segment. There is only one active shipper on the remaining Bainville-Plentywood segment, Columbia Grain at Merc, located about a mile south of Plentywood. The commodity has been outbound wheat. Traffic has been about 1300 cars per year. The line is maintained at 25 m.p.h. (Banks Report, Phase I, Phase II).

The Glendive-Sidney-Snowden line (78.6 miles) connects the BNSF coal-carrying main line through Glendive with the BNSF Hi-Line at Snowden. Track speed is 40 m.p.h. Excepting 3 carloads in 2003, no traffic originated or terminated between Glendive and Sidney in years 2000-2003. There is substantial traffic (over 6000 cars/year) originating/terminating between Sidney and Snowden, primarily sugar, grains, petroleum, stone. (Banks Report, Phase II). This is in addition to the function of the Glendive-Snowden in transporting bridge traffic or empty equipment. I am concerned about YVRR operation of the Glendive-Snowden line as it is a key artery in the BNSF system for the movement of coal equipment, and it joins the former Northern Pacific with the former Great Northern.

5. It is clear to me that a "package" is involved whereby YVRR and BNSF are not only involved in a lease of lines, but also project an operating relationship (through trackage

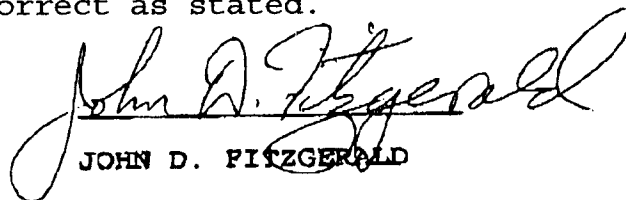
rights and otherwise) constituting a coordination of facilities and operations. Indeed, the Banks report states that BNSF (in late August 2004) publicly announced its intention for a "package deal" involving sale of Bainville-Plentywood (including Scobey), lease and operation of the line between Glendive-Snowden, and trackage rights on BNSF between Bainville and Williston. (Banks, Phase II, 30).

6. I consider the BNSF agreement with YVRR to constitute a unilateral major change by BNSF in the BNSF/UTU collective bargaining agreement, without following the required provisions for doing so under the Railway Labor Act. Moreover, I do not believe the transaction should qualify under the non-carrier line acquisition class exemption. I do not consider the substantial overhead trackage rights to be "incidental" to the line leases proposed in this proceeding, particularly between Snowden and Bainville.

7. I ask that the Board stay the exemption, or the exercise of the exemption, pending full discovery, and disposition of any petition to revoke.

STATE OF COLORADO)
COUNTY OF JEFFERSON)

Under the penalties of perjury, I affirm that the foregoing
verified statement is true and correct as stated.


JOHN D. FITZGERALD

Dated at
Arvada, CO
August 8, 2005

